NORDIN KAMAN & ORS.

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, MELAKA
WAN YAHYA J
[CRIMINAL APPEAL NO. 15 OF 1982]
11 FEBRUARY 1983

***CRIMINAL LAW AND PROCEDURE*:** *Culpable homicide - Not amounting to murder - Section 304 Penal Code - Defence called on reduced charge of s. 323 Penal Code - Offence took place in an orientation ceremony in army - Deceased was a soldier - Deserted army after 17 days' leave - Arrested about 2 months later and sentenced to 90 days' detention - Escaped during detention - Rearrested - Uncertainty regarding actual form and nature of ceremony - Object.*

***CRIMINAL LAW AND PROCEDURE*:** *Sentence - Whether the 1/3 of the maximum punishment rule still applicable - Guidelines for imposing sentences.*

This was an appeal by the 1st appellant against conviction and all five against their sentences of 9 months' imprisonment imposed by the President, Sessions Court, Malacca for an offence under s. 323 of the Penal Code. All the five appellants were originally charged for culpable homicide not amounting to murder, an offence under s. 304 of the Penal Code but at the end of the prosecution's case the learned President found that no case was made out under s. 304 of the Penal Code but found sufficient evidence to warrant defence to be called under s. 323 of the Penal Code. All five appellants elected to remain silent when the amended charge was read out and consequently the learned President convicted them on the amended charge for the offence under s. 323 of the Penal Code.

The deceased, Private Dalbir Singh joined the army in 1975. In 1976 his father passed away. On 15 June 1977, he failed to return to the 4th Engineering Squadron, Taiping after 17 days' leave and for this act of indiscipline, he was arrested on 17 August 1977 and sentenced to 90 days' detention at the 1st Commando Regiment, Sungai Udang and sent there on 25 August 1977. After serving his detention for 25 days, the deceased escaped because, as he informed his mother, he could not bear the torture inflicted upon him at the camp. On 10 February 1978, the deceased's mother Madam Jasmit Kaur, unaware of the so called orientation ceremony and the subsequent brutality that awaited the deceased and no doubt acting out of her sense of duty reported his whereabouts to the military authorities in Seremban and had him arrested. Barely 3 days later, she was called upon to identify the body of her son in an almost unrecognisable state. He had injuries over his body and his hair, eyebrows and even his eyelids. According to four witnesses who were army personnel the deceased who was handed over to the guard room on 13 February 1978 at 1.30 p.m. was first shaved and assaulted by the regimental police and those on duty at the guard room and after that was ordered to walk along the line of 8 fellow detainess, who rained upon him slaps and punches. The deceased died soon after this unfortunate episode and the post-mortem report on him shows, amongst other injuries, ten broken ribs, massive internal bleeding in his abdominal and chest cavities and injuries to his liver, pancreas, kidneys and his intestines.

As to the appeal against conviction, Counsel for the 1st appellant attacked the learned President's findings of fact on his client's actual participation in the assault, in particular, the learned President's reliance on PW16, an eye witness to the assault who had given two versions of the incident. The alleged objectionable part of the learned President's judgment reads as follows:

> There were about 4 - 5 officers with the Sikh. They are the 5 accused persons. He and the other detainees were asked to line up. They were instructed to shake hands with the Sikh and slap him. They also punched the Sikh. He said that the accused persons slapped and punched the Sikh in an aggressive manner. After receiving the punch the Sikh was groaning. However in his re-examination PW16 said he saw only the 5th accused punching the Sikh.

As for the appeal against sentence, Counsel for the appellants submitted that a nine months' imprisonment term imposed on a first offender in respect of an offence punishable with one year was excessive. He further submitted that the learned President had erroneously imputed malice in the offence when there was none. He urged the Court to apply the antiquated one third of the maximum punishment rule.

Held:

[1] The learned President, by disclosing the two versions given by PW16, was aware of the contradiction and was mindful of the value attributable to this witness's testimony. It was also obvious from the manner in which he proceeded to consider the individual evidence of witnesses that he was not placing reliance on any particular witness, but on their collective evidence as a whole.

[2] A trial Judge may, in the exercise of his judicious duty, accept or reject the veracity of witnesses according to his aesthetic discernment. Not only may he prefer the evidence of one witness to that of another but also accept one and reject the other parts of the same witness's evidence. Even if the learned President were to dispense with the evidence of PW16, there was before him a very cogent and complete account of the 1st appellant's participation in the offence to warrant his finding on this fact.

[3] There was no error on the part of the learned President in arriving at his decision and therefore the appeal against conviction was dismissed.

[4] No term of imprisonment, however long, imposed upon the appellants can resuscitate life of the deceased, but public interest demands that they be adequately punished as a deterrent to both themselves and others. The sentence should also serve as affirmation of the enshrined principle of Article 8 of the Constitution, that is, all persons, including the deceased, are equal before the law and entitled to equal protection by the law.

[5] The custodial sentence imposed by the learned President was ordered to be stayed but the term of imprisonment was reduced from 9 months to 6 months.

[1st appellant's appeal against conviction dismissed. Appellants' appeal against sentence reduced from 9 months to 6 months.]

Cases referred to:
Cheah Boon Hean v. R. [1888] 1 CLJ 64
Mohamed Jusoh v. PP [1947] MLJ 130
Low Ooi Lin v. R. [1949] MLJ 210

Legislation referred to:
Federal Constitution, art. 8
Penal Code, ss. 304, 323

For the appellants - Md. Noor bin Don; M/s. Radzi Sheikh Ahmad, Noor & Farid
For the respondent - C.W. Chan; DPP

JUDGMENT

Wan Yahya J:

Private Dalbir Singh (now deceased) joined the army in 1975. In 1976 his father passed away. On 15 June 1977 he failed to return to the 4th Engineering Squadron, Taiping after 17 days' leave. For this act of indiscipline he was arrested on 17 August 1977 and sentenced to 90 days' detention at the 1st Commando Regiment, Sungai Udang. He was sent there on 25 August 1977. After serving his detention for 25 days Dalbir escaped because, as he informed his mother, he could not bear the torture inflicted upon him at the camp. On 10 February 1978 Madam Jasmit Kaur, Dalbir's mother, unaware of the so called orientation ceremony and the subsequent brutality that awaited her son, - reported his whereabouts to the military authorities in Seremban and had him arrested. No doubt she was acting out of her sense of duty, but, ironically, this innocuous act turned out to be a sentence of death on her own flesh and blood. Barely three days afterwards she was called upon to identify the body of her son in an almost unrecognisable state. He had injuries over his body and his hair, eyebrows and even his eyelids had not been spared from the agile razor of his tormentors.

It would appear from the evidence that at 1.30 p.m. on 13 February 1978 the deceased was handed over to the guard room at Sungai Udang, where he was subjected to what four witnesses, who were army personnel, described as an orientation ceremony. There is some uncertainty regarding the actual form and nature of the ceremony but the object of it is clearly to punish the detainee. According to the witnesses, the deceased was first shaved and assaulted by the regimental police and those on duty at the guard room and after that was ordered to walk along a line of 8 fellow detainess, who rained upon him slaps and punches. It is common knowledge that an assault by 8 persons is an excruciating experience for anybody, but when the assaultors happen to include some men from the Commando unit, the resulting injuries can be mortiferous.

To cut short, Dalbir Singh died soon after this unfortunate episode and the post mortem report on him shows, amongst other injuries, ten broken ribs, massive internal bleeding in his abdominal and chest cavities and injuries to his liver, pancreas, kidneys and intestines.

As a result of this incident, the five appellants, who were on duty at that time, were charged for culpable homicide not amounting to murder in the Sessions Court, Melaka. At the end of prosecution case the learned trial President found that a case under s. 304 had not been made out but there was sufficient evidence to warrant defence to be called under s. 323 of the Penal Code. When the amended charge was read out, all five appellants elected to remain silent. Consequently the learned President convicted them for the offence under the amended charge.

The 1st appellant appealed against the conviction and all five appealed against their sentences.

In this Court the Counsel for the 1st appellant took to issue the learned President's findings of fact on his client's actual participation in the assault. In particular, Counsel attacked the learned President's reliance on PW16, an eye witness to the assault. Now PW16 Lance Corporal Shamsuddin, had first mentioned in his evidence "that all the 5 appellants were on duty on that day" followed by the expression "whoever was on duty also slapped the Sikh".

Subsequently however this witness said he did not see the 1st appellant or the other three assaulting the deceased and that he only saw the 5th appellant slapping the deceased. The alleged objectionable part of the learned President's judgment runs as follows:

> There were about 4 - 5 officers with the Sikh. They are the 5 accused persons. He and the other detainees were asked to line up. They were instructed to shake hands with the Sikh and slap him. They also punched the Sikh. He said that the accused persons slapped and punched the Sikh in an aggressive manner. After receiving the punch the Sikh was groaning. However in his re-examination PW16 said that he saw only the 5th accused punching the Sikh.

My understanding of the above passage is that the learned President, by disclosing the two versions given by PW16, was aware of the contradiction and was mindful of the value attributable to this witness's testimony. It is also obvious from the manner in which he proceeded to consider the individual evidence of witnesses that he was not placing reliance on any particular witness, but on their collective evidence as a whole. In this case, as conceded by the learned Counsel for the appellants, there is another eye-witness to the incident, viz., Hamdan bin Hamid, ex soldier, whose uncontrovertible evidence shows that the 1st as well as the other four appellants had assaulted the deceased earlier before subjecting him to the assaults by the eight detainees.

It is a settled system of our criminal law that a trial Judge may, in the exercise of his judicious duty, accept or reject the veracity of witnesses according to his aesthetic discernment. Not only may he prefer the evidence of one witness to that of another but also accept one and reject the other parts of the same witness's evidence. Such a finding by a Judge normally follows penetrating observation on the demeanour of the witness while giving evidence from the witness box and while in Court; scrutiny of the witness's own evidence as well as by comparison of the relationship between the witness and the offence as well as the offender. PW16 is a Lance Corporal with the army and he had been subpoenaed by the prosecution to testify against several army personnel, most of whom were of senior rank to him. His reluctance to give incriminating evidence is obvious from the record of proceedings. His testimony is punctuated with excuses of inability to see or to remember important details. He was most guarded in whatever answers he gave. But there were instances when the truth slipped out from his mouth, but on realising this, he immediately contradicted himself. PW17, on the other hand, gave his evidence freely and with greater authenticity. His unrestrained and somewhat fearless account of the incident is understandable in view of his detachment from the army at the time of giving evidence.

Taking into consideration these circumstances, the contradiction by and between the two witnesses is explicable and becomes less significant. Even if the learned President were to dispense with the evidence of PW16, there was before him a very cogent and complete account of the 1st appellant's participation in the offence to warrant his finding on this fact.

I therefore find no error on the part of the learned President in arriving at his decision. The appeal against conviction is therefore dismissed.

As for the appeal against sentence, Counsel for the appellants submitted that a nine months' imprisonment term imposed on a first offender in respect of an offence punishable with one year is excessive. He alleged further that the learned President had erroneously imputed malice in the offence when there was none. Counsel urged me to apply the antiquated one third of the maximum punishment rule. Counsel, no doubt, had in mind the authority of *Cheah Boon Hean v. R.* [1888] 1 CLJ 64. That case was however overruled by the Court of Appeal in *Mohamed Jusoh v. PP* [1947] MLJ 130 and in *Low Ooi Lin v. R.* [1949] MLJ 210, where the Court laid down several guidelines for imposing sentences, *viz*:

(i) Nature of offence;

(ii) Circumstances under which it was committed;

(iii) Degree of deliberation;

(iv) Whether the offence is an organised crime;

(v) Provocation;

(vi) Whether violence was involved; and

(vii) Antecedents of accused.

Except for the first and the last items for consideration above, the remaining five are definitely not in the appellant's favour. The offence was not a spontaneous one and certainly well organised. Shaving the deceased of every hair from his face and head takes time and preparation and getting a team of detainees to line up and assault him in succession involves both organisation and deliberation. As for provocation, there is not even the slightest suggestion. In fact Counsel was the one who suggested that the slapping and punching by the appellants were not in retaliation to the reduction in rank suffered by some of them as a result of the deceased's escape from custody. The violence and circumstances of its commission are fully illustrated in the report of his post mortem and they alone will outweigh all the other considerations in their favour.

A soldier is, no doubt, susceptible to more occupational hazards than a civilian, but he is nonetheless a citizen and is entitled to full protection under our Constitution. I have not lost sight of the fact that assaults were inflicted individually and separately but then the five appellants, under whose custody the deceased was detained, must have been aware of the cumulative effect of their brutal punishment. Even if they had not taken part in the assault, they cannot abdicate their responsibilities and put the blame on some dumb and deadly so-called tradition of the army.

It is the pride of every loyal citizen of this country to witness the development of our military muscle through strict discipline, especially so in keeping with their patriotic role as defenders of our sovereignty, but no right thinking member of our society will tolerate acts of brazen bullying in whatever name one calls it.

I am mindful of the fact that no term of imprisonment, however long, imposed upon the appellants can resuscitate the life of Private Dalbir Singh, but public interest demands that they be adequately punished as a deterrent to both themselves and others, who may find it hard to discard this old and brutal tradition. In so doing it is also our intention to open the eyes of those in authority, such as their superiors, who, according to their evidence, hitherto had occupied their desks in blissful ignorance of these atrocities. And lastly may this sentence also serve as our affirmation of the enshrined principle of Article 8 of our democratic Constitution, that is all persons, including Private Dalbir Singh, are equal before the law and entitled to equal protection by law.

The custodial sentence imposed by the learned President stays but the term of imprisonment is reduced from 9 months to 6 months.

Also found at [1983] 1 CLJ 313